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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON GARCIA,

Defendant and Appellant.

B240815

(Los Angeles County  
Super. Ct. No. BA355199)

APPEAL from a judgment of the Los Angeles County Superior Court, Drew E. Edwards, Judge. Affirmed as modified.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Paul M. Roadarmel, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

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Ramon Garcia was convicted by a jury on two counts of attempted willful, deliberate and premeditated murder with true findings on the special allegations the crimes had been committed for the benefit of a criminal street gang and a principal had used and discharged a firearm in committing the offenses proximately causing great bodily injury. On appeal Garcia argues only that, in sentencing him to an indeterminate aggregate state prison term of 35 years to life, the trial court violated Penal Code section 12022.53, subdivision (e)(2),<sup>1</sup> by imposing both the 25-year-to-life firearm-use enhancement and a 10-year criminal street gang enhancement because there was no finding he had personally discharged a firearm in the commission of the offenses. The Attorney General concedes the trial court erred, and we agree.

### **DISCUSSION**

The firearm-use enhancements specified in section 12022.53 generally apply only to the personal use or discharge of a firearm in the commission of a statutorily specified offense. Section 12022.53, subdivision (e)(1), creates an exception to this personal use requirement when the offense is committed to benefit a criminal street gang within the meaning of section 186.22 even if the defendant did not personally use or discharge a firearm but another principal did.<sup>2</sup>

Section 12022.53, subdivision (e)(2), however, moderates the effect of subdivision (e)(1).<sup>3</sup> A defendant who personally used or discharged a firearm in the commission of a

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<sup>1</sup> Statutory references are to the Penal Code.

<sup>2</sup> Section 12022.53, subdivision (e)(1), states, “The enhancements provided in this section [concerning use or discharge of a firearm] shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).”

<sup>3</sup> Section 12022.53, subdivision (e)(2), states, “An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.”

specified offense for the benefit of a criminal street gang is subject to both the punishment provided in section 186.22 and the increased punishment provided in section 12022.53, but, when only another principal in the offense has used or discharged the firearm, the non-using defendant is not subject to “[a]n enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to” section 12022.53. (See *People v. Brookfield* (2009) 47 Cal.4th 583, 591 [only those offenders who personally used or discharged a firearm in committing a gang-related offense specified in § 12022.53 are subject to both the enhancement provisions of that section and the gang-related sentence increases of § 186.22].)

Here, the jury convicted Garcia of the attempted willful, deliberate and premeditated murder of German Preciado Llamas and Armando Llamas (§§ 187, subd. (a), 664, subd. (a))—an offense included within those enumerated in section 12022.53, subdivision (a). (See § 12022.53, subd. (a)(17), (18).) The jury also found true as to both counts the allegations the offenses were committed for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b), and further found true as to both counts the allegations a principal had personally used and discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivisions (b), (c) and (d). The jury was not asked to find, and there was, therefore, no finding, that Garcia himself had personally used and discharged the firearm during the attempted murders.

Garcia was sentenced to concurrent 35-years-to-life terms on the two counts: life with the possibility of parole for attempted willful, deliberate and premeditated murder, plus 25-years-to-life for the firearm enhancement pursuant to section 12022.53, subdivision (d), plus 10 years for the criminal street gang enhancement pursuant to section 186.22, subdivision (b)(1)(C).<sup>4</sup> Although the 25-years-to-life firearm-use

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<sup>4</sup> As Garcia’s counsel has observed, because attempted willful, deliberate and premeditated murder is punishable by imprisonment in the state prison for life, when that

enhancement was properly included in Garcia's sentence on both counts under section 12022.53, subdivision (e)(1), pursuant to section 12022.53, subdivision (e)(2), and *People v. Brookfield, supra*, 47 Cal.4th 583, it was error for the trial court to additionally impose any criminal street gang enhancement without a finding Garcia had personally discharged the firearm in committing the offenses. Accordingly, we strike that enhancement from the sentence on each count.

### **DISPOSITION**

The judgment is modified to strike the consecutive 10-year enhancement imposed on counts 1 and 2 pursuant to section 186.22, subdivision (b)(1)(C). In all other respects the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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crime has been committed for the benefit of a criminal street gang, the minimum 15-year parole eligibility period specified in section 186.22, subdivision (b)(5), would be the proper criminal street gang enhancement, not the 10-year term for violent felonies in subdivision (b)(1)(C).